

**VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY  
OFFICE OF FINANCIAL ASSURANCE  
ABILITY TO PAY GUIDANCE  
CORPORATIONS**

*Effective: 9-1-1993; amended: 5-1-1998; amended: 7-1-2002*

The policies and procedures set forth in this document are intended solely for the guidance of employees of the Department of Environmental Quality (Department). They are not intended to, nor do they constitute rulemaking by the Department. They may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. Whether and how the Department applies this guidance in any given case will depend on the facts of the case.

## **1. Introduction**

This guidance applies in the following situations:

- The Department of Environmental Quality (Department) has identified a corporation as the responsible person (RP) for a petroleum release or discharge of oil and the corporation claims inability to pay for remediation costs or the amount due pursuant to applicable cost recovery guidance.
- A corporation claims inability to pay civil charges during an enforcement action.

## **2. Authority**

Section 9003(h) of Subtitle I of the Resource Conservation and Recovery Act (RCRA) and Virginia Code § 62.1-44.34:11 provide authority for considering an RP's ability to pay in State Lead referrals and in cost recovery matters. Virginia Code § 10.1-1316 of the Air Pollution Control Law provides authority for considering a person's ability to pay a civil charge in enforcement cases involving violations of the APCL and applicable regulations. Pursuant to the Department's Enforcement Manual, the Department may reduce a calculated civil charge where a facility demonstrates that a significant economic hardship would result from imposition of the full civil charge.

## **3. Definitions**

The definitions contained in RCRA Subtitle I, the State Water Control Law (Articles 9 through 11), the Air Pollution Control Law and the Virginia Waste Management Act apply. Additionally, the following definitions apply:

**"Parent"** means a corporation that owns at least 50% of the shares of the RP corporation.

**"Related party"** includes, without limitation, the RP corporation's shareholders, directors, officers, or relatives of any of the foregoing; or sibling (affiliate), parent or subsidiary corporations of the RP corporation.

**"Sibling"** means a corporation in which five or fewer persons and/or entities own at least eighty percent of the voting stock and the same persons and/or entities own at least eighty percent of the voting stock of the RP corporation.

**"Subsidiary"** means a corporation of which the RP corporation owns at least 50% of the shares.

## **4. Review Timing**

### **4.1 Enforcement Program**

The Office of Financial Assurance (OFA) generally performs the Ability to Pay analysis upon the request of Regional Office (RO) staff during consent order negotiations.

### **4.2 Petroleum Site Remediation Program**

OFA performs an Ability to Pay analysis at the request of RO staff to determine whether it is appropriate to clean up a site through the State Lead program or to require the RP to conduct the cleanup. Generally, for any site that is classified as a Priority One<sup>1</sup> site or a site which needs assessment to determine the priority, the RO case manager need not wait for the Ability to Pay analysis results to proceed with State Lead referral<sup>2</sup>. For any other type of site where the RP claims inability to pay for the necessary remediation, the RO case manager should request an Ability to Pay analysis and wait for the results before enrolling a site in the State Lead Program.

OFA staff review the application for completeness within fifteen (15) days of its receipt and complete the Ability to Pay analysis and issue a written decision within thirty (30) days of receipt of a complete application. This 30-day period may be extended if the analysis results warrant further inquiry into the applicant's financial status.

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<sup>1</sup> A Priority One site is a site where humans or other sensitive receptors (usually a biological receptor or a surface water stream) are impacted by the release. (State Lead Program Interim Operations Guide, Virginia Department of Environmental Quality (December 15, 1995).)

<sup>2</sup> However, in most cases, an Ability to Pay analysis should be performed after the referral to determine whether the Department will attempt to recover State Lead costs from the RP at a later date.

## **5. Application Process**

### **5.1. Application Requests**

When a corporate RP has claimed inability to pay for response costs or civil charges, RO personnel may request an Ability to Pay analysis from OFA. The first step is to request an Ability to Pay application from OFA. The request must include:

- RP name.
- RP address.
- RP telephone number(s).
- Pollution complaint number (PC#), permit number, or registration number (if applicable).
- Site Name.
- Number and type of occurrences.
- Release report date (for petroleum releases or discharges of oil).
- Identification of the RP's type of business entity as any one of the following:
  - Individual/sole proprietorship;
  - Bankrupt;
  - Corporation;
  - Partnership;
  - Estate;
  - Non Profit Organization;
  - Local Government
  - Other (limited liability company, other entity, etc.);
- Preferred application filing deadline, if less than thirty (30) days.

Note: Only RPs identified as corporations are evaluated pursuant to this procedure.

### **5.2 Application Preparation**

When RO staff request an Ability to Pay application and provide the information listed in subsection 5.1. to OFA, the Financial Responsibility Manager (FRM) prepares the

Ability to Pay Application Instructions (Appendix 5) as indicated below and sends the Application Instructions and the Application (Appendix 6) to the RP at the address indicated in subsection 5.1.

### **5.2.1 Applicant Information**

The FRM fills in the applicant name, address, telephone number, date the application was sent, PC#/permit#/Registration# (if applicable) and site name on the Application Instructions before mailing and marks on the instruction form the documents which the RP must include with the application.

### **5.2.2 Documents to Request for Corporate Applicants**

**Corporate Ability to Pay Application:** Corporate applicants must complete and submit a Corporate Ability to Pay application.

**Financial Responsibility Demonstration:** In the case of a petroleum release or discharge of oil, if the corporation had a duty to demonstrate financial responsibility at the time of the release report, the corporation must submit the financial responsibility demonstration mechanism in effect at the time of the release report along with the application.

**Insurance Policy:** In the case of a petroleum release or discharge of oil, corporate applicants must submit a complete copy of any/all business insurance policy(ies) in effect at the time of the release report. At the discretion of the FRM, an insurance certification (Appendix 7) may be requested in lieu of the policy(ies).

**Income Tax Verification:** At the FRM's discretion, the Department may require the RP to submit a signed Form 8821 which allows the Department to obtain signed copies of the RP's tax returns directly from the Internal Revenue Service.

**Other:** The corporate applicant must submit any additional information requested on the Application Instructions.

## **5.3 Application Submittal**

The RP must submit an original, signed Ability to Pay application(s) to the mailing address and by the filing deadline specified in the Application Instructions.

## **5.4 Application Tracking**

OFA staff update the necessary Ability to Pay fields in the relevant Comprehensive

Environmental Database System (CEDS) module at the time of application issuance and receipt and when the evaluation is complete. OFA staff should utilize this database to track filing deadlines and claim disposition.

## **6. Review Process**

The Environmental Protection Agency (EPA) has developed a computer model (ABEL) which assesses an RP's ability to pay for the environmental costs associated with an enforcement or cost recovery action. The Department utilizes this model to determine whether a corporation is in a financial position to pay for corrective action costs or civil charges. A brief explanation of the ABEL analysis is contained in Appendix 1. More detailed information on ABEL can be found in the ABEL User's Manual. Both the User's Manual and the computer model may be downloaded from the web at <http://es.epa.gov/oeca/models/abel.html>. Electronic copies of the Manual are available from OFA.

The ABEL analysis consists of three phases. Phase I of ABEL provides a general assessment of a firm's recent financial health based on financial ratios. Phase II of ABEL estimates, at different probability levels, an RP's ability to pay a civil charge, invest in pollution controls or fund remediation costs. Both Phase I and II results are generated by the computer program. In the Phase III portion of the analysis, the FRM, through a review of multiple corporate documents, identifies any additional available income not previously discovered through the Phase I and II analyses.

### **6.1 Phase I-Financial Ratio Analysis**

The Phase I analysis utilizes data from at least 3 years of federal income tax returns to estimate a corporation's financial health. The ABEL User's Manual provides instructions on how to input data and run the model. In Phase I, the model calculates a list of financial ratios representing the RP's financial condition and provides an explanation of the significance of each ratio<sup>3</sup>. The Phase I portion of ABEL then presents a conclusion regarding the overall financial health of the RP. The ABEL Phase I analysis should not be used alone to render a determination of inability to pay; rather, the FRM should use the Phase I analysis in conjunction with the Phase II and III analyses to provide a more complete picture of the RP's available cash flow.

### **6.2 Phase II-Cash Flow Analysis**

Using the same tax return information input for the Phase I analysis, Phase II of ABEL projects the RP's cash flow over the next five years and uses this information to estimate the probability that the RP can pay a civil charge or penalty, invest in pollution

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<sup>3</sup>A sample Phase I output is contained in Appendix 2.

controls and/or fund remediation costs. The result is a table presenting a probability distribution of available after-tax cash flows for five years into the future--both before and after imposition of any environmental expenses<sup>4</sup>. To determine an RP's ability to fund remediation costs or pay a civil charge, only one variable, the year in which remediation costs or civil charges would be incurred, need be input into ABEL Phase II.

The formulae used to determine cash flow are contained in the ABEL User's Manual. If necessary, the FRM may use the shorthand cash flow calculation below to explain the model results to an RP. This calculation is as follows:

	Net Income	(Form 1120, line 28, which represents taxable income before net operating loss and special deductions)
+	Depreciation	(Form 1120, line 20 + depreciation from schedules)
+	Depletion	(Form 1120, line 22)
+	Amortization	(From schedules)
+	<u>Phase III total</u>	(Value of extraordinary and unnecessary expenses)
=	Total available for corrective action or civil charges/penalties.	

### 6.3 Using Phase I and II Results

Phase I of ABEL places the RP in one of three categories: healthy, poor or indeterminate (mediocre). Phase II of ABEL reports the amount the applicant can afford to pay at various probability levels. EPA recommends using the 70% probability level at which to make ability to pay determinations, because the model is conservative, being biased in favor of the RP. This means that if ABEL reports that an applicant can pay a certain amount at the 70% probability level, staff can be comfortable that the RP will be able to pay that amount.

If Phase I reports that the RP is healthy, then the RP can afford to pay whatever value is reported at the 70% probability level in the Phase II results. If the value is "0" or some amount less than the estimated civil charge or corrective action amount, staff should perform the Phase III analysis discussed below to determine if adjustments to this value are necessary. Additionally if the results of Phase I and Phase II are at odds (i.e., healthy but unable to afford costs at the 70% level or unhealthy but able to afford costs at the 70% level),

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<sup>4</sup>A sample Phase II output is contained in Appendix 3.

then the FRM should perform the Phase III analysis. The short-hand calculation discussed above also may be used.

## **6.4 Phase III-Extraordinary/Unnecessary Expenses<sup>5</sup>**

Because taxpayers usually present financial information on tax returns in a manner designed to reduce tax liability, it is necessary to conduct additional analysis of the information presented in the tax returns. The Phase III analysis takes a closer look at the corporation's expenses, assets and liabilities to determine if extra funds may be available. Following are the steps in the Phase III analysis:

### **6.4.1 Expense Analysis**

**Rent:** The application form (Appendix 6) requires the corporate RP to report whether the corporation paid rent to a related party in the most recent three years. In such cases, the RP must submit a copy of the lease agreement. When possible, the FRM should estimate a fair market value rental rate by contacting realtors in the area of related party rental property. Rent in excess of fair market rental value will be deducted from allowable expenses. When fair market rental values cannot be obtained, the FRM may authorize a reasonable reduction of the allowable rent expense provided the basis for the reduction is documented.

**Officer Compensation:** The application form and the tax return require the corporate RP to report compensation paid to officers. The application form also requires the corporation to report the locality and household size for each officer. For the purposes of this guidance, the Department considers two times the Housing and Urban Development (HUD) median income for the locality and household size of each officer to be reasonable income<sup>6</sup>. Where officer compensation exceeds this amount, the excess should be deducted from allowable expenses.

**Travel and Entertainment:** The tax return reports travel and entertainment expenses. Where, in the discretion of the FRM, these expenses appear to be excessive the FRM may authorize reductions accordingly. The basis for these

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<sup>5</sup> The Phase III worksheet is contained in Appendix 4.

<sup>6</sup> Annual updates of HUD income information will be obtained by contacting Housing and Urban Development, Economic and Market Analysis Section at (804) 771-2100 (Richmond) or by going to <http://www.huduser.org/datasets/il/fmr01/index.html>. The HUD income tables are used because they (1) are based on census data; (2) are updated regularly according to a consistent methodology; (3) establish several levels of income guidelines; and (4) are used by other government agencies. The value of twice the median income value has been selected as the measure for comparison because it constitutes a moderate value. HUD defines "wealthy" as four times the median income value.

reductions must be documented. Where the travel and entertainment expenses, when considered as a percentage of gross receipts or sales less returns and allowances (Form 1120, line 1c), increase significantly from year to year, the FRM may pursue further inquiry with the RP or may reduce the allowable amount of this expense category accordingly for years in which such expenses are greater without further inquiry.

**Transactions with Related Parties:** The application form requires the RP to report transactions with related parties. The FRM should evaluate such transactions to determine whether the RP is paying excessive amounts for the goods, assets or services purchased from related parties or is earning less than fair market value for goods, assets or services sold to related parties. The FRM makes adjustments to allowable expenses where appropriate and documents the basis for such adjustments.

**Amortization Expense:** If the RP claims any amortization expense separate from its depreciation and depletion expenses, the FRM adds the amount claimed into taxable income for the relevant year.

**Other Expenditures:** The FRM should evaluate all schedules to the tax returns to determine whether the corporation has reported large, unusual or unnecessary expenditures and may add such expenses into the taxable income for the relevant year.

**Total Expense Adjustment:** The FRM totals the reduction in allowable expenses by totaling the adjustments in this subsection. The FRM then adds the total expense reduction to the taxable income before net operating loss for the relevant year, and modifies the ABEL input (line 5) accordingly. He or she then reruns the ABEL Phase I and Phase II analyses using this modified input.

#### **6.4.2 Asset Analysis**

**Real Property:** The application form requires the RP to list all real property held by the corporation, to explain how the real property is used and to report the tax assessment for each parcel. If it appears that the real property is not necessary for the operation of the business, then the FRM may add the tax assessed value to the total available for cleanup (the Ability to Pay (ATP) total).

**Loans to Related Parties:** The application form requires the RP to list loans to related parties. Schedule L of Form 1120 also requires the taxpayer to report loans to shareholders. The full value of such loans should be included in the ATP total. If the RP contests the inclusion of the loan amounts in the ATP total, in order to



exclude such loan amounts, the RP must demonstrate that the loan is valid, is memorialized through a written loan agreement, charges a fair interest rate relative to commercial lending institution rates for similar types of loans, contains competitive repayment terms and is being repaid according to its terms.

Where the RP contends the related party is unable to repay the loan, the related party must submit a separate ability to pay application to substantiate the contention. If the related party's ability to pay application demonstrates that it cannot repay the loan, then the amount of the loan will not be included in the ATP total. The reduced amount will be included in the ATP total where the related party demonstrates it can pay some, but not all, of the outstanding loan.

**Other Assets:** In the application form, the RP is required to report its assets, their fair market value, the amount of any liabilities encumbering the assets and a description of how the assets are used in the business of the RP. The value of assets (less encumbrances) that appear unnecessary to conduct business operations should be included in the ATP total.

If the asset is an asset needed to conduct company business but is in the nature of a luxury item, then the difference between the asset's fair market value less encumbrances and the fair market value of a non-luxury equivalent should be added to the ATP total. For example, if an RP provides delivery of orders as part of its printing business and uses an unencumbered recent model luxury car as the delivery vehicle, then the blue book value of the same year model of a state government automobile may be used as the non-luxury equivalent value. The difference between the luxury car blue book value and the state car blue book value would be added to the ATP total.

### **6.4.3 Liability Analysis**

Infusion of funds from shareholders into a corporation can be classified as paid-in capital (equity) or as a loan from a shareholder (debt or liability). Classifying the funds as a liability contributes to the appearance of inability to pay. RPs must report loans from shareholders on Schedule L of Form 1120. Such loans will be reclassified as equity. To accomplish this reclassification, the FRM reduces any loans from shareholders (Form 1120, Schedule L, line 19, column d) to 0 for the ABEL input (line 20) and adds the amount to unappropriated retained earnings for the ABEL input (line 24). The FRM then reruns the ABEL analysis using these revisions.

If the RP contests the reclassification, in order to treat such loans as liabilities, the RP must demonstrate that the loan is valid, is memorialized through a written loan

agreement, contains competitive repayment terms and is being repaid according to its terms.

After making adjustments to the ABEL inputs necessary under the Phase III analysis, the FRM reruns the program. As discussed above in subsection 6.3., the cash flow at the 70% probability level constitutes the ATP total.

## **6.5 Conclusion of Financial Analysis**

### **6.5.1 ATP Total Is "0"**

**Civil Charge:** Where the ATP total is 0, OFA will communicate the results of the analysis to the RO. The RO will evaluate the appropriate civil charge in accordance with the Enforcement Manual.

**Petroleum Release or Discharge of Oil:** Where the ATP total is 0, the RP is considered unable to pay and the RO may refer the contaminated site for State Lead cleanup after determining there are no other viable RPs for the site.

### **6.5.2 ATP Total Is Greater Than "0" but less than Cleanup Cost/Civil Charge**

**Civil Charge:** Where the ATP total is more than 0 but less than the calculated civil charge, the FRM communicates the ATP total to the RO as the portion of the civil charge that the analysis indicates the RP is able to pay. The RO will evaluate the appropriate civil charge in accordance with the Enforcement Manual.

**Petroleum Release or Discharge of Oil:** Where the ATP total is more than 0, the FRM compares the ATP total to the estimated cost of performing the next phase of cleanup. This cost estimate may be obtained from the RP or from the RO responsible for overseeing the site cleanup. Where the ATP total is less than the cleanup estimate, the RP is considered unable to pay and the RO may refer the contaminated site for State Lead cleanup unless other viable RPs exist.

### **Cost Recovery:**

#### **ATP Total Less Than Cost Recovery Floor**

Where the ATP total is also less than the cost recovery floor (i.e., the estimated administrative cost of pursuing a cost recovery claim), then the FRM notes in the file that Department will not pursue a cost recovery against the RP to recover any State Lead funds spent at the site and makes the appropriate entry in CEDS.

### **ATP Total More Than Cost Recovery Floor**

Where the ATP total is less than the cleanup estimate but greater than the cost recovery floor, then the FRM notes in the file that cost recovery should proceed for the site upon completion of the State Lead action (or after the time in which at least the amount to be recovered has been obligated). The FRM also indicates in the decision memo to the appropriate RO that RO staff should track all time spent on the site for cost recovery purposes. The appropriate Department cost recovery procedure will be applied to determine the amount subject to recovery.

### **6.5.3 ATP Total At Least Equal to Cleanup Estimate or Civil Charge**

Where the ATP total is greater than or equal to the cleanup cost estimate, the RP is considered able to pay and must proceed with the next phase of cleanup, in the case of a petroleum release. This is true even where the ATP total is less than the cost recovery floor, but nonetheless, greater than or equal to the estimated cost of the next phase. If the Ability to Pay determination follows after the site has been referred to the State Lead program, the FRM notes in the file that the Department should initiate a cost recovery action to recoup the State Lead funds spent on the site. The FRM also indicates in the decision memo to the appropriate RO that RO staff should track all time spent on the site for cost recovery purposes.

In an enforcement action, where the ATP total is greater than or equal to the calculated civil charge, the RP is considered able to pay and the results of the analysis will be communicated to the RO. The RO will evaluate the appropriate civil charge in accordance with the Enforcement Manual.

## **7. ATP Recommendation**

In the case of a petroleum release or discharge of oil, OFA staff provides a written indication of ability to pay to the RP with a copy to the appropriate Regional Office (see Appendix 7 for sample letter). OFA staff also provide a written indication of ability to pay to the appropriate RO via memorandum. Upon receipt of a memorandum indicating inability to pay, RO staff should investigate further to locate other possible RPs for the site. If the FRM performs the Ability to Pay analysis pursuant to an enforcement action, OFA will provide a written summary of the analysis to the RO enforcement specialist via memorandum only, unless the RO requests otherwise.

## **8. Subsequent Applications**

In the case of a petroleum release or discharge of oil, if the Department determines that an

RP is able to pay and thus must undertake owner led corrective action, the RP may file a second ability to pay application during the course of the cleanup (and subsequent applications, where applicable) if the applicant articulates changed circumstances that have resulted in the deterioration of its financial condition since the time of the prior application.

## **9. Suspensions**

Where an RP has failed to submit the required application materials by the filing deadline (usually, within thirty (30) days of the date the claim form was mailed) and has failed to obtain an extension of the deadline, the FRM may suspend any further analysis, declare the RP able to pay, and refer the RP to the Regional Office for appropriate action. In the case of a petroleum release or discharge of oil, while RPs are participating in the Ability to Pay Program and are in compliance with the requirements of the Program (i.e., have not missed applicable filing deadlines), remediation activity requirements and report filing deadlines with respect to the occurrence for which the Ability to Pay application was issued are held in abeyance. RO report filing deadlines may run concurrently with Ability to Pay application filing deadlines.

## **10. File of Record**

Upon receipt of a request for an ability to pay application, OFA staff will establish an ability to pay file. The Department treats all tax returns and other documents containing information derived from tax returns as confidential and exempt from Virginia Freedom of Information Act requests pursuant to Section 2.2-3705 of the Virginia Freedom of Information Act. Section 2.2-3705 Va. Code Ann. (2001). All information and analyses will be maintained in each applicant's file for a period of 5 years or until site closure, whichever is longer. After this time, the file will be destroyed.

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Director, Division of Waste Program  
Coordination

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Date

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APPENDIX 1  
PHASE I/PHASE II  
EXPLANATION

## **ABEL PHASE I AND II FINANCIAL ANALYSIS**

### **ABEL Phase I--Financial Ratio Analysis**

Phase I of ABEL provides a general assessment of a firm's recent financial health based on financial ratios. The Model calculates ratios using at least three of the RP's most recent federal income tax returns. The following ratios are used in the evaluation of the RP's financial health: (1) Debt to Equity Ratio (DE) (firm's total liabilities divided by shareholders' equity); (2) Current Ratio (CR) (current assets divided by current liabilities); (3) Times Interest Earned Ratio (TIE) (earnings before interest and taxes divided by interest expense payments); (4) Beaver's Ratio (BR) (after-tax cash flow divided by total liabilities); and (5) Altman Z'-Score (AZS) (a weighted average of several financial ratios).

The target values for the previously listed ratios are the conventional values generally used in the financial community. For the DE, a value of 0 to 1.5 inclusive indicates that the RP has additional debt capacity, a sign of good financial health. In contrast, any value greater than 1.5 indicates no additional debt capacity and poor health. For the CR, any value greater than or equal to 2.0 indicates that the RP is liquid and can meet short-term obligations. For BR, any value greater than or equal to 0.2 indicates long-term solvency, that is, that internally generated cash flow is sufficient to meet total financial obligations (both current and long-term). For TIE, any value greater than or equal to 2.0 indicates solvency, that is, that the RP has the ability to meet interest payments on its debt. Finally, for AZS, any value greater than 2.9 indicates that it is unlikely that an RP will be forced into bankruptcy during the coming two (2) years. An AZS between 1.23 and 2.9 is inconclusive.

### **ABEL Phase II--Cashflow Analysis**

Using the same tax return information input for the Phase I analysis, Phase II of ABEL provides probability levels indicating whether the RP can pay a penalty, invest in pollution controls or fund remediation costs. The result produced in this phase of ABEL is a table presenting a probability distribution of available pre-tax cash flows for five years into the future. (If desired, after-tax cash flows also may be determined.)

Five variables with standard values (which can be adjusted, if necessary) also are used in Phase II. First is the Reinvestment Rate, meaning the rate at which a firm replaces equipment as it wears out. This variable is based on the firm's depreciation expenses. Because ABEL assumes that an RP can postpone investment in new equipment until remediation is achieved, it uses a standard value of zero (0) for this variable.

Second is the Discount Rate, meaning the average weighted-average-cost-of-capital (WACC) over the past ten years for an average firm. The standard value for this variable is 10.5%. Third is the Inflation Rate, which is used to convert historical financial data to current dollars and to project future cash flows. The appropriate measure of this variable is the GNP deflator. The standard value is based on the consumer pricing index.

The fourth variable using a standard value is the marginal income tax rate. This tax rate is composed of the federal tax rate for the highest corporate income level (34%) plus state and local income taxes (net of federal tax). The standard value used here is 39.4%. The fifth variable used is a smoothing constant which sets the weight of historical cash flows. If there has been a significant change in the applicant's historical cash flows, the Phase II output will suggest that Phase II be re-run using a different exponential smoothing constant, the value of which will be provided in the output.

The variables discussed above may change from time to time as EPA updates the ABEL program. Such changes will be documented in the accompanying ABEL Manual.

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APPENDIX 2  
PHASE I OUTPUT

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APPENDIX 3  
PHASE II OUTPUT



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APPENDIX 4  
PHASE III WORKSHEET

### PHASE III WORKSHEET

PC#/Permit#/Registration# and Site name \_\_\_\_\_

<b>I. Expense Reductions</b>	<b>Year</b>	<b>Year</b>	<b>Year</b>	<b>Year</b>	<b>Year</b>
Rent					
Officer compensation					
Travel and entertainment					
Related party transactions					
Other					
a.					
b.					
c.					
d.					
Amortization					
TOTAL (Add to Abel line 5 input)					
<b>II. Additions to ATP Total</b>	<b>Total</b>				
Real Property	\$				
Loans to Related Parties	\$				
Other Assets	\$				
<b>III. Liability Analysis</b>	<b>Year</b>	<b>Year</b>	<b>Year</b>	<b>Year</b>	<b>Year</b>
1. Unappropriated retained earnings (ABEL, line 24)					
2. Loans from shareholders (ABEL, line 20)					
3. Revised unappropriated retained earnings (Add 1 + 2)					
4. Revised shareholder loans	0	0	0	0	0

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APPENDIX 5  
ABILITY TO PAY  
APPLICATION INSTRUCTIONS

## ABILITY TO PAY APPLICATION INSTRUCTIONS

Applicant Name:	
Address:	
Telephone Number:	(H) (W)
Date Application Sent:	
PC#/Permit # and Site Name	

To complete the Ability to Pay application, you must submit the documents marked below:

## INDIVIDUAL/PARTNERSHIP APPLICANTS

- \_\_\_\_\_ 1. A **signed** copy of your three most recent federal individual income tax returns including **all schedules**.
- \_\_\_\_\_ 2. A copy of the W-2 forms and 1099 forms used to support your most recent tax returns.
- \_\_\_\_\_ 3. A completed, **signed and notarized** Ability to Pay Claim form.
- \_\_\_\_\_ 4. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- \_\_\_\_\_ 5. A completed, signed and notarized Certification of Annual Gallonage.
- \_\_\_\_\_ 6. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- \_\_\_\_\_ 7. A completed, signed and notarized AST Storage Capacity Affidavit.
- \_\_\_\_\_ 8. A list of all general partners, using the form enclosed.
- \_\_\_\_\_ 9. Other: \_\_\_\_\_

## BANKRUPT APPLICANTS

- \_\_\_\_\_ 1. An original **signed and notarized** Ability to Pay Bankruptcy Application form.
- \_\_\_\_\_ 2. A date-stamped copy of your Bankruptcy Petition.
- \_\_\_\_\_ 3. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- \_\_\_\_\_ 4. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.

- \_\_\_\_\_ 5. A completed, signed and notarized Certification of Annual Gallonage.
- \_\_\_\_\_ 6. A completed, signed and notarized AST Storage Capacity Affidavit.
- \_\_\_\_\_ 7. Other: \_\_\_\_\_

#### CORPORATE/PARTNERSHIP APPLICANTS

- \_\_\_\_\_ 1. A completed, **signed and notarized** Corporate Ability to Pay Claim form and all documents requested in the Claim form.
- \_\_\_\_\_ 2. A completed, signed and notarized Partnership Ability to Pay application form and all documents requested in the application form.
- \_\_\_\_\_ 3. A copy of the demonstration of financial responsibility for the year in which the release was reported to DEQ.
- \_\_\_\_\_ 4. A completed, signed and notarized Insurance Certification form and a complete copy of the insurance policy for the affected property.
- \_\_\_\_\_ 5. Other: \_\_\_\_\_

#### LOCAL GOVERNMENT APPLICANTS

- \_\_\_\_\_ 1. A completed, **signed and notarized** Local Government Ability to Pay Claim Application and all documents requested in the Application form.
- \_\_\_\_\_ 2. Other: \_\_\_\_\_

#### FILING DEADLINE

**The deadline for submission of these documents is \_\_\_\_\_ calendar days from the date these instructions were sent to you.**

#### ADDITIONAL REQUIREMENTS

If you are involved in a site remediation for a petroleum release, depending on the results of the initial analysis, you may be required to submit estimates of the cost of performing the next phase of corrective action required at the site. If estimates are required, the Department will contact you.

#### WHERE TO SUBMIT APPLICATION AND OBTAIN ASSISTANCE

Please submit all application materials to: **Department of Environmental Quality, Office of Financial Assurance 5th Floor, P. O. Box 10009, Richmond, VA 23240-0009.**

If you require assistance in completing the application materials, please call \_\_\_\_\_ at \_\_\_\_\_.

SPECIAL INSTRUCTIONS

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cc: Regional Office:

☐ PRO  
☐ TRO  
☐ NRO  
☐ WCRO  
☐ SCRO  
☐ SWRO

☐ VRO  
☐ Other Regional Staff: \_\_\_\_\_

ABILITY TO PAY GUIDANCE  
CORPORATIONS

APPENDIX 6  
APPLICATION FORM

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY  
CORPORATE ABILITY TO PAY APPLICATION

Name of Corporation	
Address	
Telephone No.	
PC#/permit#/Reg# and Site Name	

**INSTRUCTIONS**

1. Please complete the information in the preceding box and complete Attachments 1 through 9.
2. **BY SUBMITTING THIS ABILITY TO PAY APPLICATION, IN THE EVENT THE SITE IS REFERRED FOR STATE LEAD CORRECTIVE ACTION, THE APPLICANT AGREES TO GRANT THE COMMONWEALTH OF VIRGINIA, ITS EMPLOYEES, AGENTS AND CONTRACTORS ALL NECESSARY ACCESS TO THE CONTAMINATED SITE AND SURROUNDING PREMISES TO UNDERTAKE ALL NECESSARY INVESTIGATION AND REMEDIATION ACTIVITIES, INCLUDING BUT NOT LIMITED TO INSTALLATION, SAMPLING AND MAINTENANCE OF MONITORING WELLS; SOIL SAMPLING; INSTALLATION AND MAINTENANCE OF REMEDIATION EQUIPMENT; TESTING AND REMOVAL OF UNDERGROUND STORAGE TANKS; SURVEYING OF BUILDINGS FOR VAPOR IMPACTS; AND REMOVAL OF CONTAMINATED SOIL AND OTHER MEDIA.**
3. An authorized officer of the corporation must complete, sign and date the Certification which follows. This signature must be notarized.

**CERTIFICATION**

I declare that the information provided to the Department of Environmental Quality for the Corporate Ability to Pay application of [fill in corporation name] \_\_\_\_\_ is true, correct and complete to the best of my knowledge and belief.

By: \_\_\_\_\_ Title: \_\_\_\_\_

Name: \_\_\_\_\_ Date: \_\_\_\_\_

Commonwealth/State of \_\_\_\_\_ )  
\_\_\_\_\_ ) to wit:  
City/County of \_\_\_\_\_ )

Subscribed and sworn to before me by \_\_\_\_\_ on this  
\_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_



## ATTACHMENT 1 DOCUMENTATION WHICH MUST BE SUBMITTED WITH THE CORPORATE ABILITY TO PAY APPLICATION

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*Instructions: Please submit copies of the documents listed in the "Document Required" column. Submission of the tax return documents listed in item #1 and lease agreements listed in item #2 is mandatory.*

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### **DOCUMENT REQUIRED**

If you have not submitted the required document, please explain

1. Copies of the 3 most recent signed federal income tax returns with all schedules attached. If any of the returns were audited or adjusted by the IRS, please explain adjustments and/or audit results.
2. Copies of all lease agreements where the lessor or the lessee is a "related party." Please see the instructions for Attachment 7 for the definition of "related party."
3. Copies of the 3 most recent annual financial statements (Balance Sheets, Income Statements and Cash Flow Statements). You must include copies of the auditor's letters.
4. Copies of all documents prepared to support any loan applications the corporation made in the most recent year.
5. Copies of all documents assessing the corporation's current financial condition or future plans, including cash flow projections and plans for major expenditures.
6. Copies of any appraisals of assets made in the most recent year.

**ATTACHMENT 2   DESCRIPTION OF THE NATURE OF THE CORPORATION'S  
BUSINESS**

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*Instructions: In the space provided below, please provide a description of the nature of the corporate ability to pay applicant's business.*

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### ATTACHMENT 3 CORPORATE STRUCTURE

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*Instructions: Please circle the appropriate responses to the questions below and fill in blanks where applicable.*

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1. Is at least 50% of the voting stock of the corporate ability to pay applicant's stock owned by another corporation?

YES OR NO

2. If you answered "yes" to question #1, please indicate the name of the parent corporation:

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3. Does the corporate ability to pay applicant own at least 50% of the voting stock of another corporation?

YES OR NO

4. If you answered "yes" to question #3, please indicate the name of the subsidiary corporation:

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5. Is at least 80% of the voting stock of the corporate ability to pay applicant owned by five (5) or fewer persons and/or entities?

YES OR NO

6. If you answered "yes" to question #5, please answer the following questions:

a. Do the same five (5) or fewer persons and/or entities also own at least 80% of the voting stock of any other corporation? YES OR NO

b. If you answered "yes" to question #6.a., please indicate the name(s) of the sibling or affiliate corporations:

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## ATTACHMENT 4 CORPORATE ASSETS

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*Instructions: Please provide a list of the corporate ability to pay applicant's assets, the fair market value of the assets, liabilities against the assets and a description of how the assets are used in the corporation's business.*

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<b><u>ASSET</u></b>	<b><u>Fair Market Value</u></b>	<b><u>Liabilities</u></b>	<b><u>Description of How Asset is Used</u></b>
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## ATTACHMENT 5 REAL PROPERTY

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*Instructions: Please provide a list of the corporate ability to pay applicant's real property holdings, the tax assessed value of the real property and the purpose for which the real property is used.*

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<b>Description of <u>Real Property</u></b>	<b>Tax Assessed <u>Value</u></b>	<b>How Real Property <u>Is Used</u></b>
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## ATTACHMENT 6 CORPORATE OFFICER SALARIES

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*Instructions: Please provide a list of the salaries paid to the corporate ability to pay applicant's officers, the locality in which each corporate officer resides or resided and the number of persons in each corporate officer's household. Please note that this information must be provided for each year corresponding to the years for which you submitted tax returns as requested in Attachment 1.*

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<b><u>Year</u></b>	<b><u>Officer Name and Title</u></b>	<b><u>Salary</u></b>	<b><u># Persons in Household</u></b>	<b><u>City/County of Residence</u></b>
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## ATTACHMENT 7 LOANS TO RELATED PARTIES

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*Instructions: Please provide a list of the outstanding loan balances on all loans from the corporate ability to pay applicant to related parties. Related parties include the following: (1) shareholders; (2) directors; (3) officers; (4) relatives of shareholders, directors and officers; and (5) any corporation listed in Attachment 3.*

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<b><u>Name of borrower</u></b>	<b><u>Relationship to Corporation</u></b>	<b><u>Current Loan Balance</u></b>
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## ATTACHMENT 8    TRANSACTIONS WITH RELATED PARTIES

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*Instructions: Please provide a description of all transactions with "related parties" (see instructions for Attachment 7 for the definition of "related parties") for each year for which tax returns are being submitted.*

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<b><u>Year</u></b>	<b><u>Name of Related Party</u></b>	<b><u>Relationship to Corporation</u></b>	<b><u>Description of Transaction</u></b>
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## ATTACHMENT 9 GALLONAGE/STORAGE CAPACITY AFFIDAVIT

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*Instructions: Please complete the appropriate affidavit.*

*If the release occurred from an underground storage tank (UST) which stored heating oil for use on the premises where stored, please check here: \_\_\_\_\_. No gallonage or storage capacity affidavit is needed.*

*If the release occurred from an UST which was used for any purpose other than storing heating oil for use on the premises, please use the gallonage affidavit and report the gallons purchased for all regulated USTs the corporation owned or operated in Virginia for the one year period preceding the date the release was reported to DEQ.*

*If the discharge occurred from an aboveground storage tank (AST) with a capacity of 5,000 gallons or less and which was used to store heating oil for use on the premises where stored, please check here: \_\_\_\_\_. No gallonage or storage capacity affidavit is needed.*

*If the discharge occurred from any other type of AST, please use the AST storage capacity affidavit.*

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PLEASE SEE ATTACHED FORMS

**CERTIFICATION OF ANNUAL GALLONAGE**

PC# \_\_\_\_\_

NOW COMES \_\_\_\_\_, who being duly sworn, deposes and says:  
(Name of Owner/Operator)

I, \_\_\_\_\_ of  
(Name of Owner/Operator)

\_\_\_\_\_ declare that:  
(Address)

The number of gallons pumped from \_\_\_\_\_ to \_\_\_\_\_  
(start date) (end date)

through all regulated underground storage tanks which owner/operator owns and operates in the  
Commonwealth of Virginia is \_\_\_\_\_.  
(Number of Gallons)

I swear that the declarations in the preceding affidavit are true to the best of my knowledge and belief.

\_\_\_\_\_  
(Print Name of Owner/Operator)

By: \_\_\_\_\_  
(Signature)

State of \_\_\_\_\_ )  
City/County of \_\_\_\_\_ ) to wit:

Subscribed and sworn to before me by \_\_\_\_\_ on this \_\_\_\_\_  
day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_

Commonwealth of Virginia )  
 )  
City/County of \_\_\_\_\_ ) to wit:

NOW COMES \_\_\_\_\_, who being duly sworn,  
deposes and says:

I am the operator of \_\_\_\_\_ aboveground storage tanks located at the facility  
(number)  
referenced by PC#\_\_\_\_\_, and I declare that:

1. The net annual profits for this operator are less than or equal to \$10 million: (circle one)  
Yes or No

a. If you circled "Yes," please complete the following:

The number of gallons of storage capacity for all ASTs at this facility at the time the AST discharge was reported to the Department of Environmental Quality was \_\_\_\_\_.

b. If you circled "No," please complete the following:

The number of gallons of storage capacity for all ASTs at all Virginia facilities containing more than 25,000 gallons of storage capacity at the time the AST discharge was reported to the Department of Environmental Quality was \_\_\_\_\_.

2. This release was from a tank containing a product subject to the fee charged by the Commonwealth of Virginia under Section 62.1-44.34:13 of the State Water Control Law.
3. I certify that this facility is in compliance with all applicable statutes or regulations governing reporting, prevention, containment and cleanup of a discharge of oil.
4. I swear that the declarations in the preceding affidavit are true and correct to the best of my knowledge and belief.

(Facility Operator)

Commonwealth of Virginia )  
 )  
City/County of \_\_\_\_\_ ) to wit:

Subscribed and sworn to before me by \_\_\_\_\_, on this  
\_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_.

Notary Public

My commission expires: \_\_\_\_\_

ABILITY TO PAY GUIDANCE  
CORPORATIONS

APPENDIX 7  
INSURANCE CERTIFICATION

## INSURANCE CERTIFICATION

I, the undersigned, hereby certify that to the best of my knowledge and belief

(check one of the following):

\_\_\_\_\_ insurance is available (attach a copy of the policy, declarations page and endorsements)

\_\_\_\_\_ insurance is not available to cover costs associated with the environmental contamination at the site referenced by

PC#/permit #/site name \_\_\_\_\_.

I warrant and represent that I have the authority to make this certification.

\_\_\_\_\_  
Signature

Date

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Title (if any)

### THIS STATEMENT MUST BE NOTARIZED

State/Commonwealth of \_\_\_\_\_ )

)

to wit:

City/County of \_\_\_\_\_ )

Subscribed and sworn to before me by \_\_\_\_\_ on this  
\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_.

ABILITY TO PAY GUIDANCE  
CORPORATIONS

APPENDIX 8  
ABILITY TO PAY  
SAMPLE DECISION LETTER

*(Letter to RP in UST Program deemed Unable to Pay)*

(Date)

(Applicant Name)

(Address)

Re: Ability to Pay Determination; PC# \_\_\_\_\_; (Site Name)

Dear (Applicant Name):

The Department of Environmental Quality (DEQ) has completed an assessment of the Ability to Pay application you submitted and our analysis indicates that you are unable to pay for corrective action costs. DEQ will seek to identify other responsible parties for this site. If no other responsible parties who are financially capable of performing the remediation are identified, the Commonwealth of Virginia may undertake the necessary corrective action procedures, up to total per occurrence costs of \$1 million.

Please note that DEQ may use either state or federal funds for corrective action at this site. If federal funds are used, federal law may require you to complete another Ability to Pay application after the completion of the corrective action to determine whether you must repay federal funds expended for remediation of the site. The Department also has the option of pursuing recovery of any state funds expended for remediation from you as well, in the event your financial condition changes so that you are able to pay any corrective action costs.

If you have any questions regarding this matter, please contact me at (804) 698-XXXX.

Sincerely,

(Name)

Financial Responsibility Manager

cc: RO contact



*(Letter to RP in UST program deemed Able to Pay)*

(Date)

(Applicant Name)

(Address)

Re: Ability to Pay Determination; PC# \_\_\_\_\_; (Site Name)

Dear Applicant Name:

The Department has completed a review of your Ability to Pay application, and our analysis indicates that you are able to pay the corrective action costs associated with cleaning up the referenced petroleum release.

[Give broad explanation of why RP was determined able to pay]

Please be aware that for eligible releases you may submit for reimbursement from the Virginia Petroleum Storage Tank Fund of reasonable costs for eligible activities and materials pre-approved and verified by [RO name] Regional Office staff. For releases from a heating oil tank, you must meet a financial responsibility requirement of \$500 with approved costs before any reimbursement will be issued. To qualify for reimbursement, please follow the procedures contained in the Department of Environmental Quality's Reimbursement Guidance manual. The manual may be downloaded from the Department's Web site at <http://www.deq.state.va.us/tanks/reimbrs.html> or you may contact me for a copy.

Please feel free to contact me at [number] if you have any questions,

Sincerely,

[Financial Responsibility Manager]

Enc.